I assess the damages under the Fatal Accidents Enactment at $650 to be divided between the Plaintiff and his 2 infant sons in the proportion of $360 to the Plaintiff and the balance between the two sons equally viz., $145 each.

I now deal with the assessment of damages claimed under the Civil Law Enactment No. 3/37.

Firstly, the claim for $70 funeral expenses. The Plaintiff gave no evidence as to this, except of the fact that he "took the body to the burial ground at Bidor."

In the absence of such evidence I consider that the sum of $50.00 should be sufficient for the funeral of a mining cooly. In respect of this claim, I therefore award the plaintiff $50.00.

I now approach the claim for damages by reason of the deceased being deprived of her expectation of life, which, until the passing of Enactment 3/1937 could not be recovered by a deceased person's personal representative. The relevant sections of this Enactment have been taken from the English "Law Reform (Miscellaneous Provisions) Act 1934," an Act on which the Lord Chief Justice of England, Lord Hewart, has commented on the incomprehensibility of its statutory provisions and the difficulty of applying them! However, since the legislature has introduced this law into these States, I must endeavour to do the almost impossible; namely, to form an estimate in terms of dollars of the value of human life, either to a person himself, or to others connected with him.

It is established that a living person can claim damages for loss of expectation of life, and now since the passing of the above Enactment, the moment before the deceased woman died, there was, apart from her actual death a few seconds later, a cause of action vested in her for deprivation or loss of expectation of life. Before the Enactment, that cause of action would have ceased with her death. That same cause of action, by force of the Enactment, now survives in the administrator.

To quote Lord Atkin in *Rose v. Ford*[1] (1937) A.C. at p. 834 "There seems to me to be a substantial distinction between damages awarded to the living, because life is shortened, and damages to a third person, because of some other person's death."

Had the deceased been alive now, and making this claim on her own account, it would not be so difficult to assess the damages.

I have no evidence as to her life, except that she was a mining-cooly, working most of the day, so that she was obliged to leave her children to the care of her husband's sister-in-law. Her occupation was, to a certain extent, of a dangerous nature: she might have died of subsequent childbirths.

The calculation cannot be based on loss of earning capacity, and one is not allowed to base it upon the social position of the person whose life is shortened (per Greaves-Lord, J. in *Trubyfield v. Great Western Railway Co.*[2]). The fact that the death was instantaneous, as in the present case, was held by Lewis J., in *Morgan v. Scoulding*[3] to be no bar to a claim for damages for shortened expectation of life.

In the present case, I must take into account the fact that I have awarded the Plaintiff damages under the Fatal Accidents Enactment, and that the persons who benefit under that Enactment also benefit personally under the intestacy of the deceased, under the 1937 Enactment, and consequently the damages awarded under the Fatal Accidents Enactment must be taken into consideration, (*Feay v. Barnwell*[4]).

It is impossible to arrive at even an approximate figure for the damages suffered by reason of the deceased's shortened expectation of life. A Jury might be able to do so, by striking an average amongst themselves.

In my opinion, $1,000 would be a reasonable amount in the present circumstances, and I award this sum in addition to the claim for funeral expenses, less the amount previously awarded.

I therefore give judgment for the Plaintiff under Civil Law Enactment for $400, in addition to the sum of $650.00 already awarded under the Fatal Accidents Enactment, with costs.

Judgment for the plaintiff.

[ORIGINAL CIVIL JURISDICTION]
HOWES, J.
October 18, 1940.

VALAUTHA ASSARI son of MUTHU KARUPPAN ASSARI
(Plaintiff)
vs.
VISALACHI ACHI alias MEENACHI ACHI, Administratrix of the estate of M.A.R. ARUMUGAM CHETTIAR
(Defendant).
[IPOH CIVIL SUIT No. 42 of 1940]

Limitation—Express Trustee—distinguished from agent for sale—mere permission to borrow does not end relationship of trustee and cestuique trust.

In this case the plaintiff claimed (1) an account be taken of the management of lands by M.A.R. Arumugam Chettiar deceased from the 21st day of January 1921 to the date of sale of the lands on the 18th day of December 1925 and an order for payment of any sum of money found to be due to the plaintiff as a result of the said management (2) an order for payment of the sum of $1,100.00 being the sale price of the said land, less $100.00 commission to the plaintiff (3) interest at the rate of 12% from the 18th day of December 1925 to the date of judgment of this suit on the total sum found due to the plaintiff (4) interest at the rate of 8% from the date of judgment to date of payment (5) such other relief as to the Court may seem just. The defendant alleged that M.A.R. Arumugam Chettiar was only the agent for sale of the land, and that as this agency terminated on the sale of the land on December 18th 1925 the action would be barred by limitation three years after that date.

Held, that in the circumstances there was an express trust of the lands, that the trust could only be discharged by handing over to the plaintiff (as the person entitled) the money which came into his hands as such trustee, and that the plea of limitation cannot be set up.

Cases referred to:—

(1) *Burdick v. Garrick,* L.R. 5 Ch. 233.

(2) *Henry v. Hammond,* (1913) 2 K.B. 515.

(3) *Soar v. Ashwell,* (1893) 2 Q.B. 390.

(4) *New Zealand and Australian Land Co. v. Watson,* 7 Q.B.D. at p. 382.

M. Farr for Plaintiff.

B. K. Das for Defendant.

The facts and arguments sufficiently appear from the report.

Cur. Adv. Vult.

Howes, J.—[After setting out the plaintiff's Statement of Claim mentioned in the headnotes his Lordship proceeded:—] The facts as disclosed from the plain-evidence and the documents, show that:

On the 23rd December, 1919 the plaintiff acquired a half share in Grant No. 8006 for $3,000.00.

On 9th April 1920, the plaintiff sold one half of his half share to a woman Seripah for $1,700.00 retaining the balance (one-quarter of Grant No. 8006) for himself.

On 21st January 1921, the plaintiff transferred this remaining quarter interest in Grant 8006 to M.A.R. Arumugam Chetty (hereinafter referred to as the deceased) for $250.00 after which the plaintiff went to India.

On the 16th December 1925, the deceased sold this quarter-interest in the same land (then comprised in Certificate of Title No. 6272 Lot 14135) to K.A. Dawoosah Rawther, for $1,200.00 (less a commission of $100.00), and received $1,100.00 net.

On the 25th February 1939, deceased died and subsequently letters of administration were granted to the defendant, who is sued in her capacity of administratrix of the deceased.

In July or August 1939, the plaintiff returned to Malaya for the first time since his departure in 1921.

According to the plaintiff, the deceased and he had been friends since childhood, and came from the same village in India. In 1920, his father being ill, the plaintiff wished to go to India for an uncertain time. As this piece of rubber land was the only property the plaintiff had in Malaya, he asked the deceased to take care of it for him, and, if it were profitable to do so, to sell the land and send the money to him in India.

The deceased promised to tap the rubber and collect the income until the land was sold. The plaintiff said he trusted the deceased completely, as he was a very good friend and a keen business man.

The plaintiff says he signed the transfer to deceased under the impression that he was signing a power of attorney. No money passed, and he did not know that the consideration for the sale had been put at $250.00.

Presumably, that figure was inserted with a view to saving stamp fees, as, in view of the fact that the plaintiff had previously sold one quarter for $1,700.00 in April 1920, and the deceased subsequently sold the land for $1,200.00, the figure $250.00 must have been only a nominal one.

The deceased visited India in 1923 and stayed for about a year. The plaintiff saw him and inquired about the land. The deceased said "I have collected the income and credited it to your name. I haven't sold the land yet". Later, the deceased returned to Malaya, and on the 18th December, 1925 sold the land, as already stated

Nine months later, on the 13th September 1926, the deceased wrote to the plaintiff (ex. 6) "Now, your rubber land has been sold at $1,200.00, a commission of $100.00 was paid and the balance of $1,100.00 has been credited to you here".

No reference was made to the income which had been collected by deceased between the transfer to him and the date of the sale of the land.

Although in the statement of defence it was alleged that the transfer of the land to the deceased was an actual sale, and the land was never held in trust for the plaintiff, that position has not been maintained

at the trial, in view of the deceased's letter (Ex. 6). The defendant's Advocate has relied on the Limitation Enactment, and submits that even if the deceased was a trustee of the land, once it was sold, and the proceeds and income were free to be used by the deceased as he liked, the trust ceased, and thereafter the relationship between the plaintiff and deceased was that of a debtor and creditor, to which Limitation would apply.

According to para. 5 of the plaint, it had been verbally arranged between the plaintiff and deceased that after selling the rubber, the deceased should credit the balance in hand from time to time to an account in the name of the plaintiff in the books of the deceased's firm.

Para. 6 of the plaint stated that the deceased was to be at liberty in his capacity as a money-lender, to borrow the said money at interest and employ the same in his business of money-lending.

Para. 7 of the plaint stated it was a further term of the verbal arrangement that the deceased should sell the land and credit the purchase price to the plaintiff's account with the deceased.

The plaintiff, in evidence, stated that the arrangement made in 1921 was that the deceased should send the proceeds of the rubber and of the sale of the land to the plaintiff in India; but when the deceased came to India in 1923 and told him he had not yet sold the land, but had credited the plaintiff with the proceeds of the sale of the rubber, the plaintiff accepted this arrangement, in view of the deceased's promise to send him a final account after the sale of the land.

When the deceased again came to India in 1927, according to the plaintiff, on his asking the deceased for an account, the latter said "I have got your money on deposit and it carries interest, and any time you want it, you can have it".

The plaintiff did not see the deceased again till about 1935, when the deceased paid another visit to India. During that visit, the parties had certain business transactions about a party-wall and other matters, which resulted in the plaintiff giving a "Debit receipt" to the deceased, dated 21st November 1936 (Ex. 9) in which the plaintiff referred to "the account to my credit in your Batu Gajah firm, by the sale of the plantation in my name", the receipt being for a total sum of Rs. 835. It was clearly the intention of the parties that this sum should be debited against the money held by the deceased on deposit at Batu Gajah.

The plaintiff admits that he has not credited the deceased with this amount in his claim, and consequently his present claim must be reduced by the dollar equivalent, viz. $540.19.

In cross-examination, the plaintiff said that "when the deceased told me he had the income for 1921-25 on deposit to my credit, I agreed to his keeping it. Deceased could use the money in his business. What he does with the money I don't know..... He wrote to say it was on deposit and carrying interest".

The plaintiff said that in 1927 when the deceased came to India, "He told me the money was on deposit with his firm and was carrying interest. I did not ask him to pay me. I never asked him to repay it until just before his death. It was an ordinary thing to do with a Chettiar. All my family business is done through his family. He promised me 6% interest".

Mr. Das, advocate for the defendant, called no evidence. He referred to the plaint Prayer (1) and says this discloses only an action against an agent for an account, and consequently the claim should have been brought within three years of the date of demand. He admits there was an agency for sale, but contends that, as the agency terminated on the sale of the land on December 16th 1925, the action would be barred by limitation three years after that date.

If it were a trust, he maintained that the deceased had no power to advance money to himself; whereas para. 6 of the plaint says it was a term of the arrangement that the deceased could "borrow the said money or any part thereof at interest and employ the same in his business of moneylending".

If, (Mr. Das contends) an agent has free use of the money, there can be no question of an express trust.

In support, he refers to the case of *Henry v. Hammond*,[2] in which Channell, J. stated at p. 521 —

> "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his **cestui que** trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor".

If that was the position in the present case, clearly the defence of Limitation would be bound to succeed. There is, however, this important distinction.

In *Henry v. Hammond* the defendant was employed to carry out an ordinary commercial transaction in the way of his business as a shipping agent, and Channell, J. adopted the observation of Bramwell, L.J. is *New Zealand and Australian Land Co. v. Watson,*[4] that he would be very sorry to see the intricacies and doctrines connected with trusts introduced into commercial transactions. It was on this basis that Channell, J. held that the defendant as a shipping agent was not bound to keep the money of each of the persons by whom he is employed in the course of that business separate, and that Limitation was a good defence.

In the present case, it cannot be suggested that the collection of income from, and the sale of the rubber land, as agent for the plaintiff, was a transaction in the ordinary course of the business of the deceased as a chettiar. Consequently, the above principles laid down by Channell, J. have no application.

It is, I think, common ground that the deceased was an agent to collect the income from the rubber estate, and for the sale of the plaintiff's land which he held in trust.

The deceased was, therefore, on the authority of cases like *Soar v. Ashwell,*[3] and *Burdick v. Garrick,*[1] an express trustee. He received the income as trustee: he sold the land as trustee: he received the proceeds of the sale as trustee for and on behalf of the plaintiff.

This state of things having been shown to exist, it may be presumed under Section 114 of the Evidence Enactment, Illustration (d) that it continued to exist till the contrary is shown. The onus was on the defendant to prove that the relationship of trustee and *cestui que trust* had terminated, and that a new relationship of debtor and creditor had come into being.

The deceased's letter of 13th September 1926, is, in my opinion an admission that he was holding the proceeds of the sale of the land in trust for the plaintiff.

The defendant relies on the arrangement mentioned in para. 6 of the plaint, that the deceased could borrow the money, and use it in his business of moneylending. The mere fact that the deceased was given permission to borrow the money, cannot, in my view, by itself put an end to the relationship of trustee and *cestui que trust.* It must be proved clearly that the deceased did in fact borrow the money in pursuance of the arrangement, and thereby put an end to his trusteeship. This has not been done. The books of account of the deceased might have thrown some light on this; but as they were not produced the Court is entitled to presume that these would be adverse to the defendant's contention.

I am therefore satisfied that the deceased was a trustee for a specific purpose, and that he could only discharge himself by handing over to the plaintiff (as the person entitled) the moneys which came into his hands as such trustee, and that the plea of Limitation cannot be set up.

I give judgment for the plaintiff in terms of Prayer (1) and, falling agreement between the parties, order that an account be taken by the Deputy Registrar of this Court.

Under Prayer (2), I give judgment for the plaintiff for the sum of $1,100.00 from which the defendant is entitled to set off the sum of $540.19 (for which the plaintiff has not given credit) on the taking of accounts.

With regard to Prayer (3), I allow punitive interest at the rate of 6% per annum on the sum found to be due to the plaintiff on Prayers (1) and (2).

As to Prayer (4), I allow interest on the total sum found to be due to the plaintiff from date of judgment to the date of payment, also at the rate of 6 per cent per annum.

The plaintiff will have the costs of the suit.

Judgment for the plaintiff.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J. S.S., GORDON-SMITH, Ag. J.A. & HORNE, J.

January 17, 1941.

YONG JOO LIN, YONG SHOOK LIN AND YONG LOO LIN

Plaintiffs (Appellants)

vs.

FUNG POI FONG

Defendant (Respondent).

[CIVIL APPEAL No. 7 of 1940]

Easement of support—Presumption of lost modern grant—Acquisition of easement of support after uninterrupted user for twenty years possible in the F.M.S. —Land Code 1926—Civil Law Enactment S. 2—Specific Relief Enactment 1903.